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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 36

FRANCIS L. VAN DUSEN, United States District Judge, *et al.*,

Petitioners,

v.

ROBERTA BARRACK, Administratrix, etc., *et al.*,

Respondents.

BRIEF OF RESPONDENTS LAISTER, BIRENBAUM, AND SYLVIA BARRACK, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1962

No. 738

FRANCIS L. VAN DUSEN, United States District Judge, et al.,

Petitioners,

v.

ROBERTA BARRACK, Administratrix, etc., *et al.*,

Respondents.

BRIEF OF RESPONDENTS LAISTER, BIRENBAUM, AND SYLVIA BARRACK, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Questions Presented

1. Where plaintiffs lacked capacity to sue in Massachusetts, was transfer, under 28 U.S.C. 1404(a), proper?

2. Would transfer from Pennsylvania to Massachusetts be proper where it might deprive Pennsylvania citizens of the benefits of Pennsylvania public policy?

Statement of the Case

1. The Actions Below

The actions below brought in the district of their residence by respondents Doris Laister, Selma Birenbaum, and Sylvia Barrack, against Eastern Airlines only, are for wrongful death of their respective husbands in the Boston crash of October 4, 1960.

Each of the decedents was a citizen and resident of Pennsylvania; the estate of each is being administered in Pennsylvania; and each of the respondents is a citizen of Pennsylvania, except Doris Laister, who was a citizen of Pennsylvania at the time of the accident and at the time the action was started, but who has since moved to Florida. The flight was from Boston to Philadelphia, and the Birenbaum and Barrack tickets had been bought in Pennsylvania.

2. Order of Transfer

Defendant, Eastern Airlines, moved to transfer these actions to Massachusetts. This motion paralleled similar motions in other cases arising out of the accident made by this defendant and other defendants in those actions. Transfer was resisted on the facts, and in addition plaintiffs argued that transfer would deny them the possible application of Pennsylvania public policy. The District Court of Pennsylvania ordered the transfer of these actions and all other actions arising out of the accident.

3. Writ of Mandamus

On plaintiffs' petitions, the Court of Appeals directed the issuance of a writ of mandamus. The court held that since capacity to sue is governed by Massachusetts law under which a foreign administrator lacks capacity, the actions were not ones which "might have been brought" in the District of Massachusetts and, consequently, could not have been transferred there.

REASONS FOR DENYING THE WRIT

1. The Decision Below Has Very Limited Application. Its Alleged Effect Has Been Grossly Exaggerated.

Petitioners maintain that the decision of the Court of Appeals will have a grave and far reaching effect on Section 1404(a); indeed that it will "nullify" it in death actions (Pet. General Motors Corp., Eastern Airlines, Inc. and Lockheed Aircraft Corp., 6-8). They state that the potential transferee District Courts would be limited to seven in number, whereas 44 would be excluded. This claim is grossly exaggerated.

It is to be noted that transfer, under 1404(a), may be ordered only to districts where actions might have been *"brought"*, and not to those where they might have been maintained, or judgments obtained, as stated by petitioners (Pet. 7).

The fact is that, in addition to Massachusetts, only six jurisdictions have held that a foreign administrator lacks the capacity to bring suit for wrongful death.[1]

Of the remaining 44 jurisdictions 30 have held that a foreign administrator may bring a wrongful death action.[2]

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[1] Connecticut: *Noel* v. *St. Johnsbury Trucking Co.*, 157 F. Supp. 432 (DC Conn.); Kentucky: *Louisville and NR Co.* v. *Brantley*, 96 Ky. 297, 28 S. W. 477 (1894); North Carolina: *Hall* v. *So. R. Co.*, 146 N. C. 345, 59 S. E. 879 (1907); South Carolina: *Coburn* v. *Coleman*, 75 F. Supp. 107 (D.C.S.C. 1947); Virginia: *Holt* v. *Middlebrook*, 214 F. 2d 187 (4th Cir. 1954); West Virginia: *Rybolt* v. *Jarett*, 112 F. 2d 642 (4th Cir. 1940).

[2] Seven jurisdictions are conceded (see footnote 2, Pet. 7). As to the remaining jurisdictions see: 52 A.L.R. 2d 1048-1073; 16 Am. Jur., Death § 265, pp. 184-185; Moore's Federal Practice (2d ed.), Vol. 3, ¶ 17.19, p. 1386; 31 Harv. L. Rev. 1167. Alabama: Ala. Code Title 61 § 151, *Campbell* v. *Hughes*, 155 Ala. 591; 47 So. 45; Arkansas: *St. Louis S. K. Co.* v. *Graham*, 83 Ark. 61,

(footnote continued on next page.)

Fourteen states have not decided the question, but reason and text writers favor the overwhelming weight of authority.[3]

In predicting dire consequences to the federal transfer practice, petitioners have apparently failed to distinguish between a foreign administrator suing *as* an administrator, and his suing under a wrongful death statute.

Where a foreign adminstrator is suing as an ordinary personal representative for the use and benefit of the

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(footnote continued from page 3)

102 S. W. 700 (1907); California: *Wallan* v. *Rankin*, 173 F. 2d 488 (9th Cir. 1949); District of Columbia: *Western U. Tel. Co.* v. *Lipscomb*, 22 App. D. C. 104 (1903); Florida: *Florida Cent. and P. R. Co.* v. *Sullivan*, 120 Fed. 799 (5th Cir. 1903); Georgia: Ga. Code §§ 113-2401, 2403, *Taylor* v. *McKee*, 121 Ga. 223, 48 S. E. 943 (1904); Illinois: *Wabash, St. L. and P. R. Co.* v. *Shacklet*, 105 Ill. 364 (1883); Indiana: *Jeffersonville, M. & I. R. Co.* v. *Hendricks*, 41 Ind. 48 (1872), *Memphis and C. Packet Co.* v. *Pikey*, 142 Ind. 304, 40 N. E. 527 (1895), *Bradshaw* v. *Moyers*, 152 F. Supp. 249 (D. C. Ind. 1957); Kansas: *Kent* v. *Kansas Power and Light Co.*, 123 F. Supp. 662 (D. C. Kan. 1954); Maryland: *Smith* v. *Potomac Edison Co.*, 165 F. Supp. 681 (D. C. Md. 1958) (by implication); New Hampshire: *Ghilain* v. *Couture*, 84 N. H. 48, 146 Atl. 395 (1929); New Jersey: *Public Serv. Electric Co.* v. *Post*, 257 Fed. 933 (3rd Cir. 1919), N. J. Rev. Stat. §§ 3A, 12-7; New York: *Provost* v. *Int'l. Giant Safety Coaster Co.*, 152 App. Div. 83, 136 N.Y.S. 654 (1st Dept. 1912), affd. 208 N. Y. 635, 102 N. E. 1112 (1913), N. Y. Decedent's Estates Law § 130; Ohio: *Popp* v. *Cincinnati, H. & D. R. Co.*, 96 Fed. 465 (C. C. Ohio 1899); Pennsylvania: *Greene* v. *Goodyear*, 112 F. Supp. 27 (D. C. Pa. 1953); Rhode Island: R. I. Gen. Laws Ann. § 10-7-2; South Dakota: *Kerr* v. *Basham*, 62 S. D. 301 (1934); Tennessee: *Citizens Fidelity Bank and Trust Co.* v. *Baese*, 136 F. Supp. 683 (D. C. Tenn. 1955); Wyoming: *Ashley* v. *Read Const. Co.*, 195 F. Supp. 727 (D. C. Wyo. 1961). See also: Minnesota: Minn. Stat. § 573.05; Mississippi: Miss. Code Ann. §§ 622, 1453; Nebraska: Neb. Rev. Stat. §§ 30-807, 30-809; Oklahoma: *Kansas Pac. Ry. Co.* v. *Cutter*, 16 Kan. 568 (1876) (interpreting Kansas Statute from which the Oklahoma Statute was derived, and cited in Oklahoma Statutes Annotated).

[3] See: Moore's Federal Practice (2d ed.), Vol. 3, par. 17.19, p. 1386; 21 Harv. L. Rev. 1167. 16 Am. Jur., Death § 265, pp. 184-185.

general estate of his decedent, he lacks authority to sue on the theory that no state can allow property within its jurisdiction to be diverted so as to deprive its own citizens of an opportunity to enforce their claims against it.

"But practically all of the courts which have considered the questions have admitted an exception to the rule where the personal representative is suing, not for the benefit of the general estate, but for the use and benefit of a specified person or classes of person . . ." under a wrongful death statute, *Citizens' Fidelity Bank and Trust Co.* v. *Baese*, 136 F. Supp. 683, 684 (D. C. Tenn. 1955). In the latter case the administrator is suing not in his capacity as such but in the character of a trustee or agent for the benefit of persons entitled to recover. As the recovery belongs to the named beneficiaries, it is not an asset of the estate and the rights of local creditors are not involved.

Massachusetts, if not unique, is in the small minority in holding that a foreign administrator may not sue *under a wrongful death statute* without first obtaining ancillary letters in that state. (*Boutillier* v. *Wesinger*, 322 Mass. 495, 78 N. E. 2d 195 [1948]).

In summation, the number of jurisdictions in which courts have held that a foreign administrator cannot bring an action for the benefit of the decedent's heirs under the forum's wrongful death statute is small (7 including Massachusetts) in comparison to those jurisdictions which permit such an action (at least 30, and probably 44). For this reason, the administration of Section 1404(a), if it is affected at all by the decision below, will be affected only with respect to a handful of states.

2. The Decision Below Is Correct.

Inasmuch as the plaintiffs Laister, Birenbaum, and Sylvia Barrack did not raise the narrow point on which the Court of Appeals based its decision these respondents will

not deal with this issue herein, except to indicate their agreement with the views stated by the Court below.

3. The Decision Below Is Correct on Other Grounds, Also, and Consequently Should Not Be Disturbed.

Massachusetts law limits recovery in a wrongful death action to $20,000.[4] There is no such limitation in Pennsylvania law. Indeed, there is every reason to believe that Pennsylvania public policy would prohibit the invocation of the Massachusetts limitation. Pennsylvania's Constitution (Art. 3, § 21) has a prohibition against wrongful death limitations.

Thus it appears that Pennsylvania would follow the doctrine of *Kilberg* v. *Northeast Airlines*, 9 N. Y. 2d 34, 211 N.Y.S. 2d 133, 172 N. E. 2d 526 (1961), in which the highest court of New York held that the Massachusetts limitation was contrary to New York's public policy, and would not be enforced, although the right of action for wrongful death created by Massachusetts law would be enforced by New York courts.

The constitutionality of the *Kilberg* doctrine has been upheld in *Pearson* v. *Northeast Airlines, Inc.*, 199 F. Supp. 539 (S.D.N.Y. 1961), rev'd 307 F. 2d 131 (2nd Cir. 1962), rev'd *en banc* 309 F. 2d 553 (2nd Cir. 1962), cert. den. —— U. S. —— (Feb. 18, 1963).

Cases raising the *Kilberg* question, i.e., whether Pennsylvania would refuse to enforce another state's limitation of damages for wrongful death, are presently pending before Pennsylvania state courts.[5] While it cannot be stated with certainty that Pennsylvania follows *Kilberg* it appears to respondents to be the overwhelming probability.

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[4] Mass. Gen. Law Ann. Ch. 229, § 2 (Supp. 1961).

[5] *Shackton* v. *Eastern Airlines*, and *Griffith* v. *United Airlines*, pending in Pennsylvania's Court of Common Pleas.

In any event, if the instant cases are transferred, the Massachusetts or transferee court may not have the power to apply Pennsylvania public policy, or even if it does have such power, may not choose to exercise it.

The problem arises out of the basic proposition established by *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64 (1938), that a federal district court must apply the substantive law of the state in which it sits. This substantive law includes its conflict of laws rules, *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487 (1941), and its public policy, *Griffin* v. *McCoach*, 313 U. S. 498 (1941); and *Angel* v. *Bullock*, 330 U. S. 183 (1947). Thus it would seem initially from these important decisions that the transferee court would be obliged to follow the public policy of Massachusetts, rather than Pennsylvania, the transferor state. Several cases support this view: *Reynolds* v. *Baltimore & Ohio Railroad Co.*, 185 F. 2d 27 (7th Cir. 1950), cert. den. 340 U. S. 947 (1951); *Boughton* v. *Shoulders*, 116 F. Supp. 391 (W. D. Ky. 1953); *Viaggio* v. *Field*, 117 F. Supp. 643 (D. C. Md. 1959); *Frachoux* v. *Lykes Brothers S.S. Company*, 117 F. Supp. 234 (S.D.N.Y. 1953); *Crawford* v. *The S.S. Shirley Lykes*, 148 F. Supp. 958 (S.D.N.Y 1957); see Kaufman, *Observations on Transfers under Section 1404(a) of the New Judicial Code*, 10 F.R.D. 395.

The deprivation of plaintiffs' right to the benefits of the public policy of the state of their residence is far more serious than the simple removal of a case from one district to another and is not "in the interest of justice" under Section 1404(a).

Conclusion

These cases should not be reviewed by this Court because the opinion below will not have any appreciable effect upon the administration of Section 1404(a).

Furthermore, the Court of Appeals' decision is correct not only on the ground stated, but for the additional rea-

son, that to allow a transfer from Pennsylvania to Massachusetts might well deprive plaintiffs of the benefits of Pennsylvania public policy relating to recoveries in wrongful death actions.

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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